

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United
States
Department of Housing and
Urban
Development, on behalf of
Corporation for Independent
Living,

Charging Party,
and
Corporation for Independent
Living,
Complainant-Intervenor,
V.

Duane George, and
Northwest Realty Group,
Inc.,
Respondents.

HUDALJ 01-89-0383-

1

Decided: August 16, 1991

David B. Harting, Esq.
For the Respondents

Cathy Vilinskis, Esq.
For the Complainant

Elizabeth Frank, Esq.
For the Government

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arises out of a complaint filed by Ann Faust, an agent of Independent Living Corporation d/b/a Corporation for Independent Living-CIL ("CIL"), the Complainant herein. The complaint alleged that Respondents Duane George ("George") and Northwest Realty Group, Inc. ("NWR") unlawfully discriminated

against
CIL by refusing to sell real estate to CIL because CIL intended to use the
property to
house mentally retarded people. The Department of Housing and Urban
Development
("HUD" or "the Government") investigated the complaint, and after deciding
that there

was reasonable cause to believe that discriminatory acts had taken place,
issued a Charge of Discrimination against the Respondents on January 25,
1991. The Charge alleged violations of sections 804(c), (d), and (f)(1) of the Fair
Housing Act (sometimes "the Act").' (42 U.S.C. Sec. 3604(c), (d), and (f)(1)). On
March 22, 1991, CIL was permitted to intervene as a separate party.
Thereafter, an oral hearing was held in Hartford, Connecticut, from April 30,
1991, through May 2, 1991, at the close of which the parties were ordered to
file proposed findings of fact, conclusions of law, and briefs in support thereof.
The last brief was filed June 17, 1991.

Findings of Fact

1. CIL is a nonprofit, 501(c)(3) corporation established in 1979 exclusively
for the purpose of fostering the development of small, noninstitutional,
community-based residences for people with disabilities or other structured
residential needs. Ninety-five percent of the individuals for whom CIL provides
housing are mentally retarded. In 1985, CIL became a holding company with
several subsidiary corporations, which were organized by functional area of
responsibility to assist CIL in carrying out its mission. The subsidiaries are
also nonprofit, and operate under the control of CIL, whose primary function is
to coordinate their activities and to engage in public education and awareness
activities. Tr.I 7-8, 140; Sx. 1.2

2. CIL Realty, Inc. ("CIL Realty") is a subsidiary of CIL and acts as a real
estate ownership entity for specialized housing projects. All of the properties
owned by CIL Realty are leased to CIL member agencies, which are also
nonprofit and which operate residential programs for handicapped people
learning to live more independently. C-EL Realty finances its construction or
renovation of residences with construction lines of credit from local banks. Tr.I
10-11. After development has been completed, the residences are permanently
financed with funds raised from tax-exempt bonds, thereby producing
significant cost savings to the lessee agencies and state funding agencies. At

the end of the lease term the properties are donated to the lessees without cost. Tr.I 23; Sx. 1.

3. CIL Development, Inc. ("CIL Development") is another subsidiary of CIL. It provides a full range of real estate development services for member agencies of CIL, including site selection, construction and renovation of residences, as well as resident coordination and placement. This subsidiary also helps lessee agencies satisfy their various funding, licensing, and regulatory requirements. Tr.I 54; Sx. 1.

4. Ann Faust ("Faust") is a CIL housing developer. Tr.]] 37. Although she is technically an employee of CIL Development, she works for CIL and all of its

1 On brief the Government abandoned its claim that Respondents violated section 804(d) of the Act.

2 The following reference abbreviations are used in this decision: "Tr.I" for "Transcript, volume I"; "TII" for "Transcript, volume H"; "Tr.M" for "Transcript, volume III"; "Sx." for "Secretary's exhibit"; and "Rx." for "Respondents' exhibit."

3

subsidiaries. Tr. 55-56. In 1989 and 1990 she was paid an annual salary of \$39,000 to \$41,000 based on a thirty-five hour work week. Tr.H 37-38.

5. NWR is a Connecticut corporation formed in 1985 for the purpose of developing properties and building homes. Tr.]] 230-31. In 1989, George, Robert Paradis, and George Lasky each owned one-third of NWR. TR.EEI 5. At the time of the hearing, the corporation was nearly dormant; it was doing only a few remodeling and renovation jobs from time to time. Tr.]Ef 231.

6. George currently is the manager, half-owner, and Secretary of NV;R. He has been responsible for developing land, building houses, and marketing properties. TR.IH ii.

7. Robert Paradis is the president and half-owner of NWR, but he has been only minimally involved in the operation of the company since its inception. Tr.H 231-32.

8. George Lasky performed site work and excavating for NWR in 1989. Tr.I 145, 151.

9. Residential Management Services ("RMS") is a nonprofit member agency of CIL that operates group homes and residential facilities for mentally retarded or developmentally disabled adults. Tr.1 20-21, 189-90.

10. On March 29, 1989, RMS and CCILRealty entered into a development contract wherein CCILRealty agreed to provide a full range of development services to find and acquire a property licensable as a group home. Tr.1 9-10; Sx.2. The contract required RMS to pay CCILRealty a fee "equal to six percent (6%) of the total cost of developing the residential setting, including, but not limited to, purchase price of the property, cost of renovations, and all related professional fees, to compensate the Corporation [CCILRealty] for its services in developing the residential setting." Sx.2, p.3. RMS further agreed to lease the developed property from CCILRealty. Sx.2. The lease was for a term of 25 years, with monthly rental payments based on property development costs at a rate sufficient to allow CCIL to meet its bond financing debt service requirements. The monthly rental payments were not to exceed the fair rental value allowed by the Connecticut Department of Income Maintenance. Sx.2. The lease also included a five-year option to purchase and provided that CIL donate the house to RMS upon expiration of the lease, at no cost to RMS.

11. While CCILRealty routinely enters into this kind of contract with member agencies, development services are actually provided by CCILDevelopment. Tr.1 56. Pursuant to this contract, Faust provided development services to RMS. Tr.1 192-93; Tr.1 41-42.

12. Faust typically needs a few months to find a suitable house, after which another six to eight weeks usually pass before CCIL is ready to go to closing. More time is required if architectural plans are needed. Tr.1 40.

4

13. RMS wanted CIL to find and acquire a home for four mentally retarded individuals, one with ambulation problems. Tr.1 43. RMS sought a four-bedroom house with city water and sewer located on a quiet, fairly level lot close to shopping and public transportation. Tr.1 193; Tr.1 44. RMS wanted the home to be ready for occupancy before the end of 1989. Tr.1 193.

14. After consulting with RMS to determine the needs of the prospective occupants of the group home, Faust contacted real estate agent Lorraine Joseph, and together they began looking at houses. Tr.1 65-68; Tr.1 44-45.

15. During their search for a house, Faust and Ms. Joseph visited the Cedar Ridge subdivision under development by NWR, where they looked at two models that on first inspection appeared to satisfy RMS's needs. Tr.1 70; Tr.1 46.

16. When Faust and Ms. Joseph later returned to Cedar Ridge with RMS representatives, including Paul Ford, Area Director of RMS, they determined on closer inspection that neither of the two models was satisfactory. However, they saw a third model, a split-level design, that was attractive, but none of the lots in the Cedar Ridge subdivision was level enough to meet the needs of the prospective occupant with ambulation problems. Tr.1 93; Tr.H 49-50, 51-52.

17. During this visit, George told Faust, Ms. Joseph, and the RMS representatives that he was working on another subdivision on Elm Street in nearby Oakville, Connecticut, where NWR could possibly build the split level on more level ground.' Tr.1 68, 198; Tr.H 52. George stated that the base price of the split level would be the same in the Elm Street project as in Cedar Ridge, \$159,500. Tr.1 52, 89. George and Faust also discussed in general terms the modifications to the house that CIL would want made if CIL decided to buy the split-level design. Tr.1 64.

18. After George described the Elm Street subdivision, he, Faust, Ms. Joseph, Ms. Barbara Westberry (the listing real estate agent for the Cedar Ridge houses), and Mr. Ford went there, walked the land, and with the aid of a subdivision map provided by George, determined the location of the various lots. At this point, very little work had been done on the land beyond clearing it; no street had been constructed. Tr.1 53-56.

19. After George showed Faust the Elm Street land, Ms. Westberry gave Faust copies of the Elm Street subdivision map and the floor plan for the split-level design. Tr.1 58; Sx. 6, 7A.

20. RMS and Faust decided that they wanted to purchase the split level on a lot in the Elm Street subdivision, and then sought approval of the house and site from the Connecticut Department of Mental Retardation ("DMR"). Tr.H 57, 60-65.

3 At some places in the record, this property is referred to as the "Hazelwood" subdivision.

21. Faust and RMS representatives showed an existing split-level house in the Cedar Ridge subdivision and lots 3 and 4 in the Elm Street subdivision to Sandy Petkus, Assistant Regional Director for DMR. Tr.1 203; Tr.1 62, 66. Ms. Petkus, on behalf of DNM, approved both lots and the split-level design. Tr.H 62, 66.

22. After receiving DNM approval, Faust and the RMS representatives returned to Elm Street and decided that Lot 4 was their first choice. Tr.][[69.

23. After CIL and RMS determined that Lot 4 was their first choice in the Elm Street subdivision, in order to preclude the sale of Lot 4 to another party, CLI's realtor, at Faust's request, drafted an "Offer to Purchase," using a pre-printed form. That document states, *inter alia*:

This is to be considered a reservation subject to buyers & sellers agreeing on plans, specifications & price. There shall be no formal contract or transfer of deposits until seller has received final subdivision approvals.

Sx.3; Tr.H 72-77. The terms of the Offer to Purchase provided that closing and transfer of title were to occur on or before October 31, 1989, a date chosen on the basis of George's representation that it would take about 90 days to build the house and the expectation that all the details of the transaction could be completed by June 30, 1989. Tr.H 70, 73-74; Tr.M 73.

24. CIL Realty executed the Offer to Purchase on May 30, 1989, and George signed it on behalf of NWR on June 1, 1989. Sx.3.

25. On May 30, 1989, Faust was fully aware that NWR and CIL Realty could not enter into a final purchase agreement for Lot 4 until the Elm Street subdivision had received final approvals from local officials. Tr.H 72. (NWR received final approvals on August 5, 1989.) Faust also knew that before the parties could enter into a final agreement, CIL would have to prepare the specifications for a revised floor plan, and CIL and NWR would have to agree on the price of modifying the split level to meet the needs of RMS. Tr.]E[72.

26. Using a floor plan and a list of standard features in NWR homes provided by Ms. Westberry, Faust prepared a revised floor plan and a detailed specifications list for proposed additions to the standard features of the split-level house. Tr.]El 58, 78-9, 8284; Sx. 9A.

27. On Friday, June 16, 1989, after receiving approval from RMS of the specifications list and revised floor plan, Faust met with RMS representatives, Ms. Joseph, George, and Ms. Westberry in Ms. Joseph's business office to start negotiating a purchase contract and to discuss features that CIL and RMS wanted in the split level. Tr.]El 89, 96-97, 102; TR.HI 68, 153.

28. The modifications that CIL and RMS wanted made to the basic split level design for the Elm Street property were estimated to cost \$15,684. Tr.111 28; Sx. 27.

29. During the June 16th meeting, George said that his partners had expressed concern that having a group home as the first home in the Elm Street subdivision would make it harder to market and sell the remaining houses. Tr.111 91; Sx. 10. According to George, his partners feared that negative perceptions of a group home in the minds of prospective buyers would adversely affect the value of the remaining Elm Street lots. Tr.1 232-33; Tr.H 92; Sx. 10.

30. In response to the concerns George raised at the June 16th meeting, Faust mediately gave him written information regarding state zoning law and studies demonstrating that a group home has no effect on nearby property values or the amount of time it takes to sell neighboring property. Tr.111 93; Sx. 4, 5, 11, 12.

31. Having frequently encountered the attitude voiced by George about group homes, Faust came to the meeting prepared to hand out information meant to allay such fears. Tr.111 93-95. During the meeting, she and representatives from RMS attempted to persuade George that his partners' concerns about the potential negative effects of a group home in the Elm Street subdivision were unfounded. Tr.1 211; TR.111 95-96.

32. Immediately after the June 16th meeting, Faust and Mr. Ford drove George by several group homes developed by CIL to show him how well they fit into their neighborhoods. Tr.1 212-13; Tr.H 97-99; Sx. 13A, 13B. George said he would describe what he had seen to his partners and then get back to Faust. Tr.111 99; Tr.H1 71.

33. In a telephone conversation on Monday, June 19, 1989, George told Faust that he had talked to his partners and they had decided not to send a house in the Elm Street subdivision to CIL. He said that they had decided they did not want a group home located in the new subdivision. Tr.111 104.

34. During the June 19th telephone conversation between Faust and George, Faust told George that she was considering filing a discrimination complaint against him. He responded in words to the effect that, if she did so, she would be sorry: he would take the lot off the market and construct a "spec house" on it that would not meet CIL's needs. Tr.111 104-06

35. On June 21, 1989, Faust signed a HUD housing discrimination complaint stating that George and NWR had refused to sell Lot 4 in the Elm

Street subdivision to CIL because CIL was going to have a group home for mentally retarded individuals built on it. Sx. 14.

⁴ A "spec house" is a house built without a specific buyer in mind and then put on the market. TrM 38.

7

36. During the period beginning with Faust's first visit to the Elm Street property and ending with the breakoff of negotiations on June 19, 1989, all parties were under the impression that the proposed split-level house would fit on either Lot 3 or Lot 4. Tr.H 67. However, zoning "setback" requirements would have precluded building the split-level house on Lot 4. Tr.I 184-86; Sx. 6, 7A, 7C, 3 1A, 3 1B, 32, 33.

37. From April 5, 1989 (the day Faust began work on this RMS project), through June 19, 1989, Faust devoted 35.5 hours to finding a house for RMS. Sx. 25A- Faust also traveled 105 miles on June 16, 1989, to attend the meeting with George regarding the Elm Street property. Sx. 26.

38. After Respondents refused to sell Lot 4 to CIL, Faust continued to look for a suitable property. Tr.1 82; Tr.H 110, 116, 127. By January 1, 1990, Faust had found a property on Buckingham Street that also met RMS's needs. Tr.][I 125. CIL Realty purchased the Buckingham Street property for \$180,000. Tr.][I 128; Sx. 23B. CIL Realty closed on the Buckingham Street house on March 22, 1990. Sx. 23B.

39. CIL spent an additional \$56,284.33 to modify the Buckingham Street property and \$13,141.45 for carrying charges.' Tr.111 128, 133, 136, 140-42; Sx. 24, 34.

40. During the nine month period beginning June 22, 1989, and ending March 22, 1990, Faust devoted 51 hours to developing the Buckingham Street property. Sx. 23A, 23B. She was not actively looking for a house for RMS during the entire nine months because Connecticut stopped approving any group homes for several months while the state revised the approval process. Tr.111 117. After June 22, 1989, Faust traveled 303 miles looking for another house for RMS. Tr.][El 117, 144-45; Sx. 26.

41. CIL recovers the cost of delivering development services by charging memberagencies aflat 6 percent development fee for completed projects. Tr.1 120-23. Time and travel expenses spent pursuing any property that CIL ultimately is unable to

purchase is a loss for CIL. Tr.1 120-23.

42. Faust spent a total of 52.5 hours pursuing CIL's fair housing complaint. Tr.H 107-08, 150; Sx. 25A, C, D.

43. CIL bills Faust's time when she works on a consulting basis at \$50 per hour. Tr.11 150. CIL reimburses Faust 22.5 cents per mile for the use of her personal automobile on official business. Tr.]El 145.

Carrying charges are the costs of holding a property until it is licensed and therefore rentable. TR.II

40. In this instance, the carrying charges consisted of utilities, loan interest, insurance, and taxes. TR.II 140-

42. Faust testified that CIL had additional carrying charges for the Buckingham Street property that would not have been incurred on the Elm Street property. Tr.H 133. She did not say the split level could have been purchased without incurring any carrying charges.

Subsidiary Findings and Discussion

The Congress passed the Fair Housing Act to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers [that] operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir.), *cert. denied*, 422 U.S. 1042 (1974), *reh. denied*, 434 U.S. 884 (1975). The Act was designed to prohibit "all forms of discrimination [even the] simple-minded." *United States v. Panna*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *revd on other grounds*, 661 F.2d 562 (6th Cir.), *cert. denied*, 465 U.S. 926 (1982). Under the Act, any "aggrieved person" has standing to file a complaint. An aggrieved person is "any person who claims to have been injured by a discriminatory housing practice; or [who] believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. Sec. 3601(l); 24 C.F.R. Sec. 100.20. The sole requirement for standing under the Act is that a complainant allege "a distinct and palpable injury" caused by a respondent. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982), *quoting Warth v. Seldir* 422 U.S. 490, 501 (1975). This requirement applies to individuals and organizations alike. *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990), *cert. denied*, U.S. , 111 S. Ct. 508 (1990)." In the Charge of Discrimination, the Government alleged the requisite injury by asserting that the Complainant CIL "has suffered damages in the form of economic loss, frustration of its corporate purposes, and the loss of its civil rights as a result of the respondents' conduct." ⁷

The Act applies to any transaction involving a "dwelling," defined as:

Any building, structure, or portion thereof which is occupied

as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale ... for the construction or location thereon of any such building, structure, or portion thereof [emphasis added]

42 U.S.C. Sec. 3602(b). The Act does not define the phrase "offered for sale." In the face of this silence, the Government argues the phrase should be given the same broad construction that the courts have repeatedly given to other terms of the Act in order to further the Act's explicit goal "to provide, within constitutional limitations, for fair

6Respondents contend for the first time on brief that the case should be dismissed because Complainant has failed to satisfy standing requirements. Respondents mistakenly argue that Complainant has suffered no economic injury at the hands of the Respondents. See discussion *infra*, pages 15-19. Respondents' argument regarding standing is therefore without merit.

'On brief, the Government has abandoned its claim regarding loss of civil rights.

housing throughout the United States." 42 U.S.C. Sec. 3601.' For example, in interpreting the requirement for a "bona fide offer" in section 804(a), courts have not required strict compliance with the technicalities of contract law. *Eg.*, *Wang v. Lake Madnhall Estates, Inc.*, 531 F.2d 832 (1976); *Davis v. Mansards*, 597 F.Supp. 334, 343 (N.D. Ind. 1984). See *Schwemm, Housing Discrimination Law and Litigation* Sec. 13.3 at 13-7-8 (1990) (protected homeseeker's offer in refusal to sell or rent cases has always been deemed bona fide). Similarly, the definition of "dwelling" in section 802(b) of the Act has received a broad interpretation. *Gilbert*, 813 F.2d at 1527 (describing a variety of housing covered as 802(b) "dwellings"). One state court has ruled that a tract of vacant land advertised for sale was not a dwelling under 802(b) in the absence of evidence of the seller's intent "to market the land as homesites." *Ryan v. Brown*, 326 So. 2d 70, 7273 (Fla. Dist. Ct. App. 1976). 'ne corollary of this holding is that vacant land will be considered a "dwelling" under section 802(b) if the evidence shows an intent to market the land as homesites.

Other federal law also supports the Government's argument that "offered for sale" must be broadly construed. The term "offered for sale" or "offer to sell" appears in several federal statutes. See, *eg.*, 12 U.S.C. Sec. 1715y; 15 U.S.C. Sec. 77b; 15 U.S.C. Sec. 1701; 15 U.S.C. Secs. 3603-04; 38 U.S.C. Sec. 1812;

43 U.S.C. Secs. 562, 571. Of these, the Interstate Land Sales Disclosure Act ("HSDA!"), 15 U.S.C. Secs. 1701-20, which regulates developers' sales of certain types of land, is the most helpful as it provides useful statutory definitions. HSDA defines developers as persons who "offer to sell" lots in a subdivision. 15 U.S.C. Sec. 1701(5). ELSDA also provides that "'offer' includes any inducement, solicitation or attempt to encourage a person to acquire a lot in a subdivision." 15 U.S.C. Sec. 1701(11). Therefore, developers or brokers "offer" a property for sale once they have commenced to market a particular parcel of land to a potential buyer through any inducement or attempt to encourage the purchase of that parcel. That means "offers" include a wide variety of acts ranging from a mere exhortation to a prospective buyer to view a piece of land, to negotiations and attempts to persuade a buyer to execute a purchase agreement. ELSDA does not narrowly define "offer for sale" to encompass only those promises to sell land which, if accepted, would create an enforceable contract. Respondents' conduct in the instant case clearly falls within the definition of "offer for sale" in ILSDA.

Respondents' conduct likewise falls within the meaning of the term "offered for sale" in the Fair Housing Act. Faust and George first met at the Cedar Ridge subdivision. From the moment George first learned of CIL's interest in the split-level

⁸See, e.g., *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972) ("The language of the **Act** is broad and inclusive."); *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 936, 937 (2d Cir.) ("[The Supreme Court has held that [the Act] must be construed expansively to implement [the goal of ending discrimination in housing]"; "Congress intended that broad application of [the Act's] antidiscrimination provisions would ultimately result in residential integration."), *affd per curiam*, 488 U.S. 15 (1988), *reh. denied*, 488 U.S. 1023 (1988); *United States v. Gilbert*, 813 F.2d 1523, 1526-27 (9th Cir. 1987), *cert denied*, 484 U.S. 860 (1987) ("The Supreme Court has observed that [the] expansive approach [to construing the Act] is carried *throughout the Act*." (emphasis added)).

design provided it could be built on more level ground, he began actively to market a lot in the Elm Street subdivision. He marketed Lot 4 to CIL by telling Faust of his development plans for the property, showing her the cleared subdivision land, discussing planned levelling of the ground, and showing her a site plan that delineated the physical boundaries of the subdivision lots. Further, he told her that he could build the split level CIL and RMS desired at Elm Street and sell it for the same base price as the split level at Cedar Ridge. These activities led to the parties' executing an offer that reserved Lot 4 for CIL.' Thereafter, George attended the June 16th meeting for the express purpose of negotiating new specifications for the house CIL wanted built on Lot 4. Despite

the fact that *NWR* had not advertised or listed the Elm Street property for sale, George clearly was attempting to sell land in the Elm Street subdivision to CIL for the purpose of building a house. Faust's conduct during the same period manifests a complementary attempt by CIL to buy land on Elm Street with an *NWR*-built house on it. The intent of the parties could not have been plainer: they intended to enter into a contract for the sale of a dwelling.

Respondents argue that Lot 4 was not "offered for sale" within the meaning of contract law, citing the definition of "offer" in the Second Restatement of Contracts, Section 24:

a manifestation of a willingness to enter into a bargain so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

This argument falls short of the mark, because if credited, Respondents' interpretation of the Act would permit housing providers to discriminate with impunity as long as no offer to sell is made that is so clear and complete that an enforceable contract will be created if the buyer gives his assent. Such a pinched and restrictive interpretation clearly runs contrary to the remedial purposes of the Act."

Citing 42 U.S.C. Sec. 1982, the Civil Rights Act of 1866, Respondents urge us to read "offered for sale" in the Fair Housing Act to mean the same as the requirement in Section 1982 cases that a property must be placed "on the open market for sale" in order to come within the purview of the statute. This reading of the Act must be rejected for the same reason that contract law cannot be used to construe the Act: both interpretations would serve to narrow rather than broaden the reach of the Act to combat housing discrimination, contrary to the intent of the Congress.

⁹Even George admits that "showing the land" is "marketing," but he contends that is so only if the subdivision is approved. TR.EII 43-46, 51-52. He gave no basis for that distinction, and there is none.

¹⁰"Congress was aware that ... [the Act] would have a very broad reach, and indeed the legislation was seen as an attempt to alter the whole character of the housing market. *Mayers v. Ridley*, 465 F.2d 630, 652 (D.C. Cir. 1972)(*en banc*)(Wilkey, J., concurring).

Interpreting the phrase "offered for sale" broadly comports with other parts of the statute. For example, the Act prohibits discrimination during *negotiation* for sale or rental (42 U.S.C. Sec. 3604(a)) and prohibits a variety of activities that precede actual sale or rental. See 42 U.S.C. Sec. 3604©

(discriminatory statements); 42 U.S.C. Sec. 3604(d) (representations regarding availability).

Respondents also contend that Lot 4 was not offered for sale because it would have been unlawful to do so before receipt of all the required subdivision approvals under Connecticut General Statutes Section 8-25(a); and the approvals did not arrive until after August 5, 1989. It is inappropriate, however, to turn to state law for interpretation of the Act. See *Kushner, Fair Housing* 8 (1983) ("State and local laws which hamper the enforcement of Title VIH are preempted by federal law."). Section 8-25(a) provides no guidance on its face as to what conduct constitutes offering subdivision land for sale." Furthermore, according to Connecticut courts, since Connecticut General Statute Section 8-25(a) is a criminal statute, "offered for sale" must be construed narrowly *in that context*." Conversely, each provision of the Fair Housing Act is to be given the broadest possible interpretation to ensure equal housing opportunities for everyone within the protected class of people. V@hile Lot 4 may or may not have been "offered for sale" under Connecticut law, the purpose of the Fair Housing Act and the evidence of record require the conclusion that the Respondents offered a "dwelling" for sale to CIL.

Respondents Violated Section 804© of the Act

Section 804© of the Fair Housing Act makes it unlawful

To make ... any ... statement ... with respect to the sale ... of a dwelling that indicates any preference, limitation, or discrimination based on ... handicap ... or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. Sec. 3604(c). This provision applies to all written or oral statements made by a person engaged in the sale of a dwelling. 24 C.F.R. Sec. 100.75.
Respondents violated

Conn. Gen. Stat. Sec. 8-25(a) provides in pertinent part:

Any person, firm or corporation who, prior to such final approval sells or offers for sale any lot subdivided pursuant to a conditional approval shall be fined not more than five hundred dollars for each lot sold or offered for sale.

¹² *State v. H@hite*, 204 Conn. 410; 528 A.2d 811, 814 (1987); *State v. McGann*, 199 Conn. 163; 506 A-2d 109 (1986).

Section 804© of the Act by making numerous statements regarding the sale of a dwelling that indicated a preference, limitation, or discrimination based on handicap or the intention to make such preference, limitation, or discrimination.

During a June 16, 1989, meeting with Faust and Mr. Ford of RMS, George made several statements indicating that *NWR* preferred not to sell to handicapped people. Faust and Mr. Ford testified that George stated that his partners at *NWR* were concerned about the adverse impact of selling the first lot in the Elm Street subdivision as the site of a group home. He said his partners feared that having a group home as the first house would lower the value of the surrounding lots and cause slower sales.

The testimony of Faust and Mr. Ford is corroborated by notes Faust made in a job report prepared shortly after the meeting. That report states in pertinent part:

11. Mr. George expressed concerns regarding property value and length of time on the market of properties surround' g community residences."

12. Mr. George was not able to negotiate a contract at this time because of these concerns. Addresses of local community residences were given to him so he can drive by them.

13. Mr. George will notify the sellers *[sic]* by June 23, 1989, of his decision to sell Lot 4 to CIL Realty Incorporated or to take it off the market.

Sx. 10.

George denies making any discriminatory statements at the June 16th meeting. He claims that he merely voiced his partners' concerns regarding the appearance the house would have after being modified to meet CIL's needs, and that those concerns were "buyer neutral"; that is, the owners of *NWR* were no more concerned about the impact of the changes CIL wanted to make than they would have been about modifications any buyer might have wanted made. The evidence does not support this contention. Mr. Lasky was an owner during the time these events occurred, and he specifically mentioned wheelchair ramps as the subject of their concern. Tr.I 147. Further, the president of *NWR*, Mr. Paradis, testified regarding CIL's interest in buying a house to be used as a group home as follows:

¹³ Faust testified that in her report she did not distinguish George's personal concerns from those of his partners. However, she said that the concerns recounted in paragraphs 11 and 12 of her job report were attributed by George to his partners. TR.II 103.

13

The only concern I had at the time was simply what do these homes look like? These people have special needs and just what does a home look like or what will it look like.

Tr.]] 236. The testimony of two of NV@R's owners shows their concern was not "buyer neutral." On the contrary, the owners of NWR clearly were worried about the superficial appearance of a house that would be occupied by handicapped people. This conclusion is confirmed by evidence that Faust gave George written information address' g common misconceptions about the economic impact of group homes and by evidence that Faust and Mr. Ford took George to see a few exemplary group homes so that he could see how well they fit into their neighborhoods. The statements made during the June 16th meeting manifest an unlawful discriminatory preference against handicapped people.

According to Faust, on June 19, 1989, in a telephone conversation with Faust, George said NWR would not sell a house in the Elm Street subdivision to a group home. Later in that conversation, after having been advised by Faust that she was considering filing a discrimination complaint, George said that she would be sorry and threatened to take Lot 4 "off the market," build a "spec" house on it that would not meet CIL's needs, and then put it back on the market.

George and Faust presented two markedly different versions of their telephone conversation of June 19th. Faust's version is more credible for several reasons. As a salaried employee of CIL, Faust had no economic motive to testify untruthfully, unlike George. Further, George's statements during the June 19th telephone conversation, as reported by Faust, are wholly consistent with the statements he made during the June 16th meeting. George's memory of the content of the June 19th conversation was implausibly better and more specific at hearing than his memory of the same conversation when he was deposed months earlier. TR.EEI 80-81, 154-155. George acknowledged that Faust became upset and angry during the June 19th telephone conversation, but he proffered a very implausible explanation for that anger. According to George, Faust became angry when he informed her that NWR could not build on Lot 4 or enter into a contract for Lot 4 at that time because subdivision

approvals had not been obtained, but that NWR would be happy to build a house for CIL someplace else. Tr.Ell 79-81. But Faust knew well before June 19th that NWR could not contract to build a house on Lot 4 until approvals of the subdivision had been secured from local officials. TR.IH 43, 6465. It is highly unlikely that Faust would have become angry and upset upon being reminded of something she already knew. While it is true that the "Offer of Purchase" indicated on its face that CIL wanted to go to closing before November 1st, given George's representation that the house could be built in 90 days, the parties could have entered into a formal contract as late as some time in September and still have satisfied RMS's desire to occupy the house by the end of the year. Tr.I 193. Since Faust's job was to satisfy RMS, and RMS apparently had not imposed an October 31 deadline, I do not believe that after having invested a fair amount of time in the project Faust would have become so angry that she would break off negotiations for an attractive house at an attractive price and file a housing discrimination complaint simply because an

14

inconsequential deadline could not be met. George's description of the June 19th telephone conversation cannot be credited.

Respondents Violated Section 804(f)(1) of the Act

Section 804(f)(1) of the Act makes it unlawful

To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of ... a person residing in or intending to reside in that dwelling after it is so sold, rented or made unavailable....

42 U.S.C. Sec. 3604(f)(1). Respondents also violated Section 804(f)(1) on June 19, 1989, by refusing to continue negotiations for the sale of a dwelling in the Elm Street subdivision because the house was going to be occupied by people with handicaps. That violation was compounded by George's expression of a willingness to sell CIL a house in another location." NWR, through its agent George, was "steering" CIL away from its new subdivision because of the perceived fears that a sale to CIL would depress sale prices on the remaining properties in the subdivision. "Steering" is not an outright refusal to sell to a person within a protected class; rather it consists of efforts to deprive a protected homeseeker of housing opportunities in certain locations. See *generally* Schwemm, *supra*, at 13-11. This type of violation falls within the "otherwise make unavailable" proscriptions of sections 804(a) and (f)(1).

Remedies

Section 812(g)(3) of the Act provides that upon a finding that a respondent has violated the Act, an administrative law judge shall order "such relief as may be appropriate, which may include actual damages suffered by the aggrieved person." 42 U.S.C. Sec. 3612(g)(3). Respondents have violated the Act through conduct that has caused actual, compensable damages to CIL."

¹⁴ This was an empty gesture as to the Cedar Ridge subdivision; NWR knew that none of the lots in Cedar Ridge was level enough to meet CIL's needs.

¹⁵ Respondents argue to the effect that whatever damages were suffered were not suffered by Complainant CIL but rather by subsidiary corporations of CIL that are not parties in the case. This argument has no merit. The record shows the operations of the parent and its wholly owned subsidiaries are so closely intertwined that it would be a triumph of form over substance to say that the parent suffered no damage as a result of damage to the subsidiaries. Damage to CIL Realty and CIL Development necessarily caused damage to CIL. *See Universal Oil Products, Co. v. Rexall Drug & Chemical Co.*, 463 F.2d 1122, 1124 (C.C.P. A. 1972). Furthermore, that the subsidiaries were not named parties caused Respondents no undue prejudice. For example, Respondents were clearly on notice before the hearing as to the existence of CIL Realty and its relationship to CIL. *See* Sx.3; Intervenor's Responses to Respondents' Interrogatory #1(a)(I)-(iv).

15

CIL's Damages

The Government seeks on behalf of CIL \$87,935.14 in damages in three separate categories of alleged losses: \$79,435.14 for out-of-pocket expenses \$3,000.00 for lost housing opportunity; and \$5,500.00 for frustration of corporate purpose.

Out-Of-Docket Losses

Not counting closing costs and CIL's development fee, the project development cost of the Buckingham Street property totalled \$249,425.33, consisting of an \$180,000.00 purchase price, \$3,306.33 architect's fees, \$13,141.00 carrying charges, and \$52,978.00 in modification expenses. ¹⁷ The Government contends that the Elm Street property would have cost only \$175,184.00, consisting of \$159,500.00 base price, plus \$15,684.00 for modifications. The difference in price between the two houses comes to \$74,241.33, to which the Government adds \$2,618.81 for Faust's expenses generated in connection with the Buckingham Street property, and \$2,575.00

for the cost of Faust's time devoted to this case. These three figures add to \$79,435.14, the amount claimed for out-of-pocket economic losses.

The Government contends that CIL is entitled to a damage award equal to the difference in the total development costs of the two properties because Respondents' refusal to sell Lot 4 in the Elm Street subdivision "forced" CIL to look for another property, ultimately buy the more expensive property on Buckingham Street, and incur architectural and carrying charges that it would not have incurred in the development of the proposed split level at Elm Street." The Government cites two cases in support of its argument that the cost of more expensive alternate housing is recoverable from persons guilty of housing discrimination: *Moore v. Townsend*, 421 F. Supp. 378 (N.D. M. 1976), *aff'd as modified*, 577 F.2d 424 (7th Cir. 1978); and *Hughes v. Dyer*, 378 F. Supp. 1305,1310 (W.D. Mo. 1974).

The *Moore* decision was issued in the aftermath of an earlier decision in a fair housing action brought under the Civil Rights Act of 1968, 42 U.S.C. Sec. 3601, *et seq.*

16 This figure is the sum of the differences in cost between the modified Elm Street house and the Buckingham Street residence, as reflected in the text of the Government's brief. However, the Government's proposed order asks for a total of \$70,340.59 for out-of-pocket losses. I assume the Government is requesting an award of the larger amount.

17 Sx. 34 shows immaterially different development costs for this property.

18 CIL concedes that the proposed split level could not have been built on Lot 4 because of "setback" requirements. This fact was not known to the parties during their negotiations. However, the split level could have been built on either Lot 2 or Lot 3 in the subdivision, both of which were available at least until August 14, 1989.

and the Civil Rights Act of 1866, 42 U.S.C. Sec. 1982, in which the District Court ordered the defendant Townsend to convey residential real estate to the plaintiffs, Mr. and Mrs. Moore. The order was stayed while the defendant unsuccessfully appealed, after which the case came back to the District Court for determination of the damages that had accrued during the stay of the Court's order and the pendency of the appeal. The Court denied all of the Moores' damage claims except a claim for the damages occasioned by an increase in the rate of interest on the mortgage loan over the rate of interest that would have been obtained if the Court's order had not been stayed during the appeal. The Court did not honor the plaintiffs' claim for the gross amount of extra interest the Moores would have to pay over the 25-year life of the mortgage. Instead, the Court awarded an amount equal to the present value of the gross amount of potential interest liability. This award rested exclusively on consideration of damages attributable to the appeal; the Court did not say what damages might be awarded if plaintiffs had claimed under the Civil Rights Act of 1968. This case therefore does not stand for the proposition that a victim of discrimination under the Fair Housing Act may recover the difference in cost between the price of the dwelling made unavailable by unlawful discrimination and the cost of more expensive alternate housing.

In the *Hughes* case, after the defendant refused to sell a house to the plaintiffs because of their race, they bought a more expensive house and sought damages for the difference in price between the two houses. The Court denied the claim, stating:

Plaintiffs claim they are entitled to the \$5,500 difference in purchase prices on the theory that defendant's actions forced them to incur this additional expense in buying a house. At trial, however, it developed that plaintiffs' new home was larger and in certain respects more valuable than defendant's property. Thus, though plaintiffs may in fact have paid more in the second transaction, and, conceivably may have received less for their money, any actual damage is highly speculative and incapable of precise calculation.

378 F. Supp. at 1310. In short, neither of the cited cases supports the Government's argument.

Although the increased cost of alternate housing may be recovered under some circumstances, in the instant case the record will not support such an award." To be sure, Respondents' refusal to sell forced CIL to look for another

property; but that refusal did not per se "force" CIL to buy a more expensive property. CIL paid \$180,000.00 for the house on Buckingham Street, but the record does not show that there were no other suitable properties on the market for less than \$180,000.00 within a reasonable period after negotiations between CIL and NWR broke down. Further, Faust testified that the Buckingham property is inferior to the split level they wanted to have built on Elm Street in that it is on a smaller lot and closer to heavy street traffic.

¹⁹ See generally Schwemm, *supra* @ para. 25.3(2)(b) and cases cited in footnotes 73, 78, and 81.

17

But that is not enough evidence to conclude that the Buckingham Street house is indeed an inferior house, and the fact that it cost approximately \$20,000.00 more before modifications than the basic split level suggests that despite its smaller lot and closer proximity to heavy street traffic, the Buckingham Street house has other features that may make it a superior value.

In any event, whether or not the Buckingham house is inferior to the house CIL wanted to buy on Elm Street, the mere fact that CIL bought a more expensive house for RMS than the Elm Street house does not mean that CIL has been damaged in an amount equal to the difference in cost between the two houses. CIL rented the Buckingham Street property to RMS at a fair rental value. CIL therefore is receiving a fair return on its investment. In other words, CIL has suffered no damage as a result of buying a more expensive house than it had hoped to buy from NWR; CIL is passing all of its costs on to RMS. Because RMS is paying more rent for the Buckingham property than it would have paid for the Elm Street property, RMS is the party that is suffering the damage; but RMS is not a party to this case, and CIL cannot recover for losses incurred by RMS.

Respondents' conduct caused CIL to divert some of its resources from the development of group homes for the mentally handicapped to pursuing a legal remedy for Respondents' unlawful conduct. The 52.5 hours Faust devoted to pre-trial preparation and to the hearing cost CIL \$2,575, and during that time she was precluded from working to foster housing opportunities for mentally retarded people. The time and money that an organization like CIL spends pursuing a legal remedy for housing discrimination diverts time and money away from the organization's other functions and goals." In other words, discrimination costs the organization the opportunity to use its resources elsewhere. These "opportunity costs" for the diversion of resources should be recouped from the parties responsible for the discrimination. See *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) ("These are opportunity costs of discrimination, since although the counseling is not impaired directly, there would be more of it were it not for the ... discrimination."); *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042, 1060

(E.D. Va. 1987) (\$2,300 for "diversion of resources"); *Davis v. Mamards*, 597 F.Supp. 334, 348 (N.D. Ind. 1984) (\$4,280 for out-of-pocket expenses). CIL will be awarded \$2,575.00 for the diversion of its resources to litigate this case.

Respondents also caused CIL to divert and waste its resources in pursuing the Elm Street house. Before negotiations with Respondents collapsed, Faust devoted 35.5 hours to developing a house for RMS. This is a clear loss to CIL for which it will be compensated in the amount of \$1,775.00 (\$50 per hour x 35.5 hours).

20 To the extent that this case deters Respondents and others from discriminating in future against group homes for the handicapped, the case will further the mission of CIL; that is, it will serve to foster the development of group homes for the disabled. However, pursuing litigation is not a stated purpose of CIL.

18

The Government requests an award of damages for the expenses CIL incurred to develop the Buckingham Street property rather than an award for the expenses incurred in connection with the Elm Street property. This request for damages cannot be honored. Faust performed 51 hours of development work after NV-IR refused to sell the Elm Street property. Since CIL bills Faust's time at \$50 per hour, the Government claims \$2,550.00 for the extra development work Faust did for RMS subsequent to Respondents' refusal to sell. In addition, Faust traveled 330 miles at a cost of \$68.18 in connection with the Buckingham Street project. CIL earned a larger development fee on the Buckingham Street property than it would have earned if it had purchased the Elm Street property. Using the Government's figures, CIL earned \$4,454.48 more, and that amount is \$1,836.30 more than the cost of Faust's time and travel spent in connection with the Buckingham Street property." The Government acknowledges the difference, but nevertheless asserts (without giving reasons) that it would be "unjust" not to reimburse CIL for Faust's time and travel expenses incurred after NWR refused to sell the Elm Street property. Inasmuch as CIL made more money than it paid Faust to pursue the Buckingham Street property, the incremental cost of her time and travel expenses incurred after collapse of the Elm Street project benefited rather than injured CIL. These costs therefore do not reflect compensable damage to CIL.

The Government also claims that CIL is entitled to damages of \$3,000.00 for the housing opportunity it allegedly lost due to Respondents' unlawful discrimination. The Government argues that because Respondents refused to sell Lot 4 or negotiate with C-EL for the sale of any other lot in the project, CIL was denied the opportunity to buy the house it wanted and instead had to buy

a less favorable house on a smaller lot in an area with heavier traffic. However, CIL did not lose a housing opportunity; that is, CIL was not looking for housing for itself, or even for its client agency, RMS. Rather, CIL was developing property for four unnamed adults who, because of their handicaps, were members of the class of people protected by the Act. Although CIL falls within the Act's definition of an "aggrieved person" with standing to sue for damages, CIL is twice removed from the people who actually suffered a lost housing opportunity at the hands of the Respondents. In other words, CIL has suffered actual damages for which it will be compensated, but it has not suffered a "distinct and palpable injury" regarding the lost housing opportunity caused by Respondents. See *Havens* 455 U.S. at 375-77; *Warth V. Seldin*, 422 U.S. 490, 501 (1975).

Finally, the Government contends that CIL is entitled to \$5,500.00 as compensation for the "frustration of corporate purpose" caused by Respondents. The Government describes three ways in which the Respondents frustrated CIL'S mission to provide housing opportunities for mentally retarded people: (1) The individuals who would have

²¹ Faust is paid approximately \$22 per hour for her services. Respondents complain that using \$50 per hour as the measure of damages is therefore excessive. Because CIL's overhead costs for facilities and management and the cost of Faust's fringe benefits must be added to the cost of her salary, \$50 per hour is an appropriate measure of the value of Faust's time.

19

resided in the Elm Street house were forced to wait for a less satisfactory alternative to be found, purchased, and renovated to meet their needs; (2) CIL was precluded from using Faust for other projects while she worked to find an alternative to the Elm Street house; and (3) Faust devoted time to this case that could have been spent furthering CIL's mission. Number (1) is the lost housing opportunity discussed above that cannot form the basis for an award to CIL. Number (2) cannot support a damage claim because Faust's development work in connection with the Buckingham Street property furthered CIL's mission while reaping a greater benefit for CIL than CIL would have earned if Respondents had not behaved unlawfully. Number (3) describes an out-of-pocket loss for which CIL will receive compensation. In short, the Government has not justified a separate award to CIL for "frustration of corporate purpose.

ii22

²² The Government cites three cases in support of its argument that CIL should be awarded \$5,500 for "frustration of corporate purpose." In the first case, *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, No. 88 C 9695, (N.D. M. Apr. 5, 1991) (LEMS, Genfed

library, Court Files), the magistrate awarded \$16,500 to a nonprofit fair housing organization, the "Leadership Council" to cover the cost of investigating the case, monitoring defendant's records, auditing defendant's sales practices, and conducting several training seminars. In other words, the Leadership Council was awarded \$16,500 for the diversion of resources caused by defendants. With respect to plaintiffs' claim for compensatory damages for "frustration of purpose," the memorandum opinion states:

[The court believes it can best evaluate the damages caused by frustration of purpose by the compensatory damages assessed. That is, if Leadership Council was damaged in the amount of \$16,500, it is reasonable to believe that diversion of its resources from other purposes must have been in approximately the same amount.

This opinion awards \$16,500 for diversion of resources, defines "frustration of purpose" in terms of diversion of resources, then awards another \$16,500 for "frustration of purpose," thereby awarding damages for the same thing twice. This case cannot be deemed persuasive authority for the argument that separate damages should be awarded to CIL for "frustration of corporate purpose" in addition to awards for diversion of its resources.

Better authority may be found for the Government's position in *Saunders*, 659 F. Supp. 1042, where the United States District Court for the Northern District of Virginia ordered payment of \$10,000 to a nonprofit fair housing corporation for frustration of the corporation's mission in addition to separate damages for diversion of resources. The Court found evidence that the defendant's large-scale discriminatory advertising had caused a subtle but substantial impact on the corporation's mission of ensuring equal housing and conveying the availability of equal housing to the public. 659 F. Supp. at 1060-61. However, no analogous evidence may be found in the instant case to support a separate award for "frustration of corporate purpose."

The Government also cites *Mansards*, 597 F. Supp. 334, to support its argument. In that case the United States District Court for the Northern District of Indiana awarded \$1,000 to the Northwest Indiana Open Housing Center, a nonprofit organization, for frustration of the Center's goals. This case also may be distinguished on the facts. The Court concluded that the lawsuit frustrated one of the Center's stated goals (enhancing cooperation between the Center and local landlords), while at the same time advancing another goal (promoting equal housing opportunities). 597 F. Supp. at 348. Unlike the record in *Mansards*, in the case at hand the evidence shows no frustration of CIL's purpose other than that manifested by the diversion of its resources, for which it will be compensated. In other words, as in a tort case, the damages awarded in this case will return CIL as much as possible to the condition it would be in if Respondents had not engaged in unlawfully discriminatory conduct. See *Cunis v. Loether*, 415 U.S. 189, 197 (1974); *Seaton v. Sky Realty Company, Inc.*, 491 F.2d 634, 636 (7th Cir. 1974); *Lee v. Souther Home Sites Corporation*, 429 F.2d 290, 293 (5th Cir. 1970).

Civil Penalties'

To vindicate the public interest, the Act authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. Sec. 812(g)(3) (A); 24 C.F.R. Sec. 104.910(b)(3). Determining an appropriate penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) the goal of deterrence; (3) whether the respondent has previously been adjudged to have committed unlawful housing discrimination;

(4) respondent's financial resources; and (5) the degree of respondent's culpability. See *Murphy* at 25,058; *BUD v. Blackwell*, Fair Housing-Fair Lending (P-H), para 25,001 at 25,014-15 (HUDALJ Dec. 21, 1989) (hereinafter *Blackwell I*), *affd*, 908 F.2d 864 (11th Cir. 1990); H.Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988).

Nature and Circumstances of the Violation

The nature and circumstances of Respondents' violations in this case do not merit a \$10,000.00 civil penalty against any Respondent. Although intentional, Respondents' unlawful discrimination apparently was not motivated by malice toward CIL or RMS or the mentally retarded individuals on whose behalf CIL sought to purchase a home. Rather, Respondents' conduct appears to have been motivated solely by economic considerations." Furthermore, there is no evidence that anyone suffered any emotional damages or was forced to live in unsatisfactory housing because of Respondents' discriminatory conduct.

Nevertheless, significant civil penalties should be imposed in this case. Respondents are professional housing providers who should have known that the Fair Housing Act prohibits any form of discrimination against the handicapped. Further, Respondents were provided by Faust with information showing that their fears regarding the adverse effect of a group home on surrounding property values were unfounded; even when warned by Faust that she was considering filing a discrimination complaint, Respondents persisted in their unlawful discrimination and neglected the opportunity to correct their conduct."

²³ The owners of NWR convincingly testified that they personally bear no animosity toward the handicapped. George has done charitable work for handicapped children through a service organization. TR.III 9. NWR sold a house nextdoor to George's personal residence to a family with a member who has multiple sclerosis. Tr.I]E[10. The president of NWR, Mr. Paradis, has taught mentally retarded children in the classroom and on the baseball field. Tr.H 234-35, 237.

²⁴ Faust filed a housing discrimination complaint with the Connecticut Commission on Human Rights and Opportunities on June 21, 1989. Respondents' Answer to the Charge of Discrimination included a copy of a letter dated August 8, 1989, from Respondents' attorney addressed to the Commission that indicates NWR was willing at that time to negotiate with CIL for the sale of Lot 4 in connection with the settlement of that complaint. Since this letter was generated in connection with the settlement of a complaint, no conclusions or inferences can be drawn from the letter about the conduct of the parties before the complaint was filed. See Fed. R.Evid. 408 and 42 U.S.C. Sec. 3601(d)(1).

Deterrence

Respondents remain in the housing business. The need to deter them from future violations of the Act is greater than it would be if they had left the industry. Imposition of an appropriate civil penalty will send a message to housing providers that discriminating against people with handicaps is "not only unlawful but expensive." *HUD v. Jerrard*, Fair Housing-Fair Lending (P-H) para. 25,005 at 25,092 (HUDALJ 04-88-0612-1, Sept. 28, 1990).

Respondents' Previous Records

There is no evidence that either Respondent in the instant case has previously been found to have committed an unlawful discriminatory housing practice. Consequently, the maximum civil penalty that may be assessed against either Respondent is \$10,000.00, pursuant to 42 U.S.C. Sec. 812(g)(3)(A) and 24 C.F.R. Sec. 104.910(b)(3)(I) (A).

Respondents' Financial Circumstances

Evidence regarding respondents' financial circumstances is peculiarly within their knowledge, so they have the burden of introducing such evidence into the record. If they fail to produce credible evidence militating against assessment of a civil penalty, a penalty may be imposed without consideration of their financial circumstances. See *Campbell v. United States*, 365 U.S. 85, 96 (1961); *H-UD v. Jerrard*, Fair Housing-Fair Lending (P-H) para. 25,005 at 25,092; *Blackwell I* at 25,015. The record does not contain any evidence indicating that George or NWR could not pay a civil penalty without suffering undue hardship.

Culpability

Respondents contend that the complaint should be dismissed as to George because he always acted in his corporate capacity as Secretary of NWR. That contention has no merit. George is not relieved of his obligation to obey the law by virtue of his agency. See, eg., *Dillon v. AFBIC Development Corp.*, 597 F.2d 556, 562-63 (5th Cir. 1979); *Jenaty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1120-21 (7th Cir. 1974). Even if we assume, *arguendo*, that George opposed his partners' decision to refuse to deal with CIL, one who acts as a conduit for the discriminatory goals of another is equally liable for that unlawful conduct, even if the former does not act with discriminatory animus. *Dwivedi*, 895 F.2d at 1530-31; *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 122326 (2d Cir. 1987), *cert. denied* 486 U.S. 1055 (1988); *Diaz v. Pan Am. World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

Nevertheless, the evidence does not show that George was personally

responsible in fact for the discriminatory conduct of NWR. Rather, it appears he merely implemented company policy. As he was manager of NWR, it was appropriate to name him as a separate respondent in this case, but it would not be appropriate to impose a

22

separate civil penalty against George personally in the absence of evidence that he was primarily responsible for the decision not to sell a house to CIL.

As developers, NWR and George were in a position where they could deprive homeseekers of an equal opportunity to buy housing, which is exactly what they did. That they apparently acted solely out of economic considerations is no excuse. This is precisely the kind of practice Congress sought to eliminate entirely from the real estate trade through the Fair Housing Act. A large civil penalty must be imposed. The Government requests a total of \$10,000.00 in civil penalties against Respondents, but maximum penalties should be reserved for the most egregious cases where the victims of discrimination suffer grievous harm. This case does not fall in that category. A civil penalty of \$7,500.00 will be imposed on NV;R.

Injunctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and protect the public interest in fair housing." 42 U.S.C. Sec. 3612(g)(3). The purposes of injunctive relief include: eliminating the effects of past discrimination, preventing future discrimination, and positioning aggrieved persons as closely as possible to the situation they would have been in but for the discrimination. See *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979), cert. denied, 445 U.S. 905 (1980), reh. denied, 423 U.S. 884 (1975). Once a judge has determined that discrimination has occurred, he or she has "the power as well as the duty to 'use any available remedy to make good the wrong done.'" *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1985) (citations omitted). The injunctive provisions of the following Order serve all of these purposes.

Conclusion

The preponderance of the evidence shows that Respondents discriminated against Complainant CIL on the basis of handicap, in violation of sections 804© and (f)(1) of the Act. Complainant CIL suffered actual damages for which it will receive a compensatory award. Further, to vindicate the public interest, injunctive relief will be ordered, as well as a civil penalty against Respondent NWR.

Order

It is hereby **ORDERED** that:

1. Respondent Duane George and Northwest Realty Group, Inc., and their agents and employees are hereby permanently enjoined from discriminating with respect to

25., Injunctive relief should be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *HTJD v. Blackwell*, 908 F.2d, 864, 875 (11th Cir. 1990) (quoting *Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir. 1983)).

23

housing because of race, color, religion, sex, familial status, national origin, or handicap. Prohibited actions include, but are not limited to:

a. refusing or failing to sell or refusing to negotiate for the sale of a dwelling to any person because of race, color, religion, sex, familial status, national origin, or handicap;

b. otherwise making unavailable or denying a dwelling to any person because of race, color, religion, sex, familial status, national origin, or handicap;

c. discriminating against any person in the terms, conditions, or privileges of sale of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, national origin, or handicap;

d. making, printing or publishing, or causing to be made, printed or published, any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, familial status, national origin, or handicap;

e. coercing, intimidating, threatening, or interfering with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the Fair Housing Act; and

f. retaliating against the Corporation for Independent Living or anyone else for their participation in this case or for any matter related thereto.

2. Respondents Duane George and Northwest Realty Group, Inc., and its

agents and employees, shall cease to employ any policies or practices that discriminate against handicapped persons in the provision of housing.

3. Respondents Duane George and Northwest Realty Group, Inc., and its agents and employees, shall refrain from using any advertisements or making any statements that indicate a discriminatory preference or limitation based on handicap.

4. Consistent with 24 C.F.R. Part 109, Northwest Realty Group, Inc., shall display the HUD fair housing logo and slogan in all advertising and documents routinely provided to the public. Consistent with 24 C.F.R. Part 110, Northwest Realty Group, Inc., shall display the HUD fair housing poster in a prominent place in its principal office, and any other offices where Northwest Realty Group, Inc., conducts business.

5. Northwest Realty Group, Inc., shall institute internal record-keeping procedures, with respect to the sale of any real property sold for residential purposes or any other real property acquired by Northwest Realty Group, Inc., or by Duane George for the purpose of selling as housing for residential use, which are adequate to comply with the requirements set forth in this Order. These will include keeping all records

described in this Order. Northwest Realty Group, Inc., will permit representatives of Representatives of HUD shall endeavor to e any convenience to Northwest Realty Group,

6. On the last day of every second month (six times per year), beginning at the becomes final, Northwest Realty Group, Inc., shall submit reports containing the following 375, Boston, Massachusetts 02222-1092:

- a. copies of listings for any properties (lots or houses) which Northwest Realty Group
- b. a list of any houses or lots owned or in the control of Northwest Realty Group, Inc., address, lot size, price, style of house, number of bedrooms in the unit, and, with respect executed;
- c. Sample copies of advertisements for houses, lots, or subdivision published during have been published during the reporting period;
- d. Sample copies of any promotional materials for houses, lots, or subdivisions if promotional materials have been published during the reporting period.

7. Within ten days of the date on which this Order becomes final, Respondents shall pay actual damages to the Corporation for Independent Living in the amount of \$4,350.

8. Within ten days of the date on which this Order becomes final, Respondent Northwest Realty Group, Inc., shall pay a civil penalty of \$7,500 to the Secretary of HUD.

9. Within ten days of the date this Order becomes final, Respondent Northwest Realty Group, Inc. shall comply with the terms and as to the requirements of the Fair Housing Act. All new employees shall be informed

10. Within 15 days of the date of this Order, Respondent Northwest Realty Group, Inc. shall

This order is entered pursuant to 42 U.S.C. Sec. 3612(g)(3) of the Fair Housing Act or the affirmance in whole or in part, by the Secretary within that time.

THOMAS C. HEINZ
Administrative Law Judge

Dated: August 16, 1991

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I hereby certify that
THOMAS C. HEINZ, Administrative Law Judge, HUDALJ 01-89-0383-1, were sent to the

Chief Docket Clerk

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